Supreme Court, U.S.
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No. 85-1468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EUGENE P. WOODS,

Petitioner;

VS.

SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent;

HELEN J. JONES,

Real Party In Interest.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR

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*HOWARD MOORE, JR.
JANE BOND MOORE
445 Bellevue Avenue, Third Floor
Oakland, California 94610
(415) 451-0104

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the United States Constitution permit California to assert personal jurisdiction over the petitioner:

A. In a new action, commenced ten (10) years after the entry of final judgment in the prior action and eight (8) years after petitioner ended his contacts with California, based upon petitioner's 1974 California dissolution.

B. In order to insure the appropriate outcome of California's only asserted interest in this matter, the application of California's community property law to the underlying disputed division of property.

C. Based upon the California court's characterization of petitioner's receipt of military retirement pay in Georgia as causing an effect in California upon the real party in interest.

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IN THE

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OCTOBER TERM, 1985

No. 85-

EUGENE P. WOODS,

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SUPERIOR COURT OF ALAMEDA COUNTY,

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Real Party In Interest.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR

Petitioner prays that a Writ of Certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, Division Four, entered in this action on September 17, 1985, petition for review to the California Supreme Court having been denied December 5, 1985.

OPINIONS BELOW

Review of the September 17, 1985 opinion of the California Court of Appeal is requested. The opinion was certified for publication on October 1, 1985. On December 5, the California Supreme Court denied review and directed the Reporter of Decisions not to publish the opinion. The order of the California Supreme Court and the opinion of the California Court of Appeal are set forth in the Appendix, *infra*.

JURISDICTION OF THIS COURT

On September 17, 1985, the judgment of the California Court of Appeal, First Appellate District, Division Four, herein sought to be reviewed, was entered. On December 5, 1985, a timely Petition for Review to the California Supreme Court was denied. On February 11, 1986 the California Court of Appeal denied Petitioner's motion to stay issuance of remittitur. Petitioner has filed a request for a stay of the remittitur with the Honorable William Rehnquist, Associate Justice of this Court and the Ninth Circuit.

Jurisdiction of this Court to grant the writ is conferred by 28 United States Code, Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

The petitioner is EUGENE P. WOODS, a male adult citizen of the United States, residing in Warner Robbins, Georgia.

Since 1979, petitioner, Eugene P. Woods, has lived in Warner Robbins, Georgia. He has not lived in California since 1977. He has no real or personal property in California. He does no business in California. He has not appeared in California in this or any other action. He has done no acts in this state or elsewhere that caused an effect in this state.

On January 15, 1974, the final judgment in petitioner's dissolution from the real party in interest was entered in Alameda County Superior Court Case Number 430820. The judgment did not refer to military retirement pay or to any other property, real or personal.

On October 26, 1984, the real party in interest commenced a new action in the Alameda County Superior Court, Case No. 591158-7. This action was entitled a complaint for partition of tenancy in common property (undivided community personal property) and for constructive trust. (The alleged undivided community property is petitioner's military retirement pay.) A summons was issued in that matter.

On January 10, 1985, petitioner was served in Georgia with the summons and complaint in this new matter. Petitioner moved to quash service of summons. On March 7, 1985, the respondent, the Superior Court of Alameda County, denied that motion in an

order which gave petitioner thirty (30) days in which to answer.

On April 8, 1985, petitioner filed a timely petition for issuance of a writ of mandate and/or a writ of prohibition in the Court of Appeal of the State of California, First Appellate District. On May 24, 1985, the Fourth Division of that Court denied the petition.

On June 3, 1985, petitioner filed a petition for review before the California Supreme Court. On July 11, 1985, that court granted the petition for review and transferred this matter to the Court of Appeal, First Appellate District, Division Four, with directions to issue an alternative writ to be heard before that court when the proceeding was ordered on calendar. On July 31, 1985, the Court of Appeal issued an alternative writ of mandate denying the motion to quash and ordering that court to issue a new order granting the motion or to show cause why a peremptory writ should not issue. On September 13, 1985, after timely filing of pleadings by both parties, argument was had before the Court of Appeal. On September 17, 1985, the Court of Appeal denied the peremptory writ and discharged the alternate writ. A copy of that Opinion is in the Appendix. On October 1, 1985, the written opinion was certified for publication by the Court of Appeal.

On October 28, 1985, petitioner file a petition for review before the California Supreme Court. On December 5, 1985, the California Supreme Court denied the petition and ordered the opinion removed from publication.

On December 23, 1985, Petitioner applied for stay of the remittitur to the appropriate court, the Cali-

fornia Court of Appeals, First Appellate District, Division Four. On February 11, 1986, the Appellate Court denied the application. A copy of that Order is in the Appendix.

The Court of Appeals based its decision on three factors: (1) that there was a present contact between petitioner and the state of California, i.e. petitioner's receipt in Georgia of military benefits, allegedly the property of a California resident, caused an effect in California (Appendix, page 5d); (2) the mistaken omission of petitioner's pension benefits as community property in the dissolution action can be appropriately corrected by applying California community property law in California courts (Appendix, page 5a); and, (3) petitioner's past contacts with California had a direct and substantial connection with the subject matter of the new action (Appendix, page 5a).

These three factors, taken together, led to the holding that "...petitioner's California contacts, through largely in the past, were of a nature and quality that support the exercise of personal jurisdiction in this action." (Appendix, page 5a).

In reaching this decision, the Court of Appeals sole citation is to a 1976 California Supreme Court case, *Cornelison v. Chaney*, 16 Cal. 3d 143 (1976). It overlooks eight post-1976 decisions of this Court which address the issue of jurisdiction over nonresident defendants, *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *World Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Keeton v. Hustler*, 465 U.S. 770 (1984); *Calder v. Jones*, 465 U.S. 783 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); and, *Burger King v.*

Rudzewicz, 105 S.Ct. 2174, 85 LED 2d 528, 53 U.S. L.W. 4541 (1985). It also overlooks controlling decisions of the California Supreme Court based upon the due process clause of the 14th Amendment, *Kumar v. Superior Court*, 32 Cal. 3d 689, 186 Cal.Rptr. 772 652 P.2d 1003 (1982) and *Secrest Machine Corporation v. Superior Court of Los Angeles County*, 33 Cal.3d 664, 190 Cal.Rptr. 175, 660 P.2d 399 (1983). In sum, the Court of Appeals ignored existing law and launched itself onto unchartered areas as to the jurisdiction of California courts over nonresident defendants.

REASONS FOR GRANTING THE WRIT

A. This Case Presents Special And Important Questions of Constitutional Law.

1.This Court has accepted certiorari in a Tenth Circuit case raising these same issues of minimal contacts and nonresident defendants, *Connolly v. Burt*, United States Supreme Court, No. 85-298. Review by this Court was granted on December 2, 1985.

The appellate decision, *Burt v. Board of Regents*, 757 F.2d. 242 (10th Cir., 1985), relied on this Court's opinions in *Keeton v. Hustler Magazine, Inc.*, *supra*, and *Calder v. Jones*, *supra*. It quoted this Court's endorsement of an "effects" test as determinative of jurisdiction. Similarly, in the instant case, the "effects" in California of petitioner's receipt of payments in Georgia, led, in part, to California's assumption of jurisdiction.

These two cases expand the concept of jurisdiction beyond what is reasonable and fair. *Burt*, which arose in the federal system, and the instant case, which arose in the state courts, are misapplications of *Kee-*

ton v. Hustler and *Calder v. Jones*. By defining the defendant's actions as intentional and calculated the *Burt* court ignored Dr. Connolly's duty to respond to request for references. It also overlooked the forum state commercial activities of the defendants in *Keeton* and *Jones* which this Court found should have led those defendants to reasonably anticipate being haled into the forum courts.

Similarly, in the instant case, the California Court of Appeal treats petitioner's receipt of payments in Georgia as intentional and calculated. Petitioner, however, is a passive actor. He receives the payments as a result of his service in the Air Force, not because he chose, nine years ago, to leave California. If petitioner had remained in California, or moved to Mississippi or Ohio, he would still receive these payments. Petitioner had no reason to anticipate, when he left California, that he would be haled into its courts to litigate this matter.

There is now a published California Court of Appeal decision on this same issue of jurisdiction over a nonresident ex-husband based upon his ancient connections with California. In *In re Marriage of Miller*, 86 Daily Journal, D.A.R. 421 (February 5, 1986), the California Fourth Appellate District, Division One, found that the ex-husband, now living in Washington, was subject to California's jurisdiction ten (10) years after leaving the state and fifteen (15) years after the judgment of dissolution was entered. The Fourth Appellate District reasons that because that ex-husband was a California resident at the time of the dissolution, California still has jurisdiction over him in a new cause of action to partition undivided community property.

Although it is a principle of California family law that community property not divided in a dissolution becomes tenancy in common subject to partition in a separate action at a later date, *Henn v. Henn*, 26 Cal.3d 323 161 Cal.Rptr. 502 605 P.2d 10 (1980), there is no continuing jurisdiction from the original dissolution action, *Henn v. Henn, supra; In re the Marriage of Bodle*, 76 Cal.App.3d 761, 143 Cal.Rptr. 115 (1978).

The Courts of Appeal are wrong as to California's present jurisdiction over non resident ex-husbands. Jurisdiction must be established independently in the new partition action. Jurisdiction in any new cause of action can only be established based upon principles of constitutional law, i.e. where the defendant resides or in a forum in which the defendant has minimum contacts, *International Shoe v. Washington*, 326 U.S. 310 (1945); *Burger King v. Rudzewicz, supra.* Jurisdiction can not attach, as the California Courts of Appeal maintain, where the defendant resided years ago at the time of the dissolution. If both parties had left California, the logic put forth by the California courts would require them to return to California to litigate the division of unasserted community property. The Courts of Appeal, in developing their doctrine of jurisdiction by "relation back", have found a theory which makes former parties to California dissolutions forever tied to California. The parties may have divorced their spouses, but they can never be free of California.

B. The Court Below Overlooked Controlling Decisions of This Court.

The California Court of Appeal did not consider and apply the eight post-1976 decisions of this Court de-

fining the correct basis for asserting jurisdiction over nonresident defendants.

It is well-settled that, in addition to reasonableness and fairness, a nonresident defendant's present purposeful activities in the forum state are the proper focus of inquiry when deciding whether or not the forum state may assert jurisdiction, *International Shoe v. Washington, supra.*

The post-1976 Supreme Court cases further explain that the Due Process Clause limits a state's ability to impose jurisdiction on a nonresident defendant to those situations in which: (a) the nonresident defendant has purposeful, ongoing contacts with the forum state; and, (b) there is a properly asserted state interest, *Kulko v. Superior Court, supra; World-Wide Volkswagen v. Woodson, supra; Keeton v. Hustler, supra; Helicopteros Nacionales de Colombia, S.F., supra; Burger King v. Rudiciwicz, supra.* The decisions forbid a primary focus on the plaintiff's unilateral activities within the forum, *Kulko v. Superior Court, supra; Keeton v. Hustler, supra; Calder v. Jones, supra;* and *Helicopteros Nacionales de Columbia, S.F., supra.* The Due Process clause also requires that the constitutional issue of jurisdiction must be resolved before any choice of law issues, such as the application of any state's property laws, *Shaffer v. Heitner, supra; Kulko v. Superior Court, supra.* Although a state's laws may be properly applied to a dispute in a case, a state may not assert jurisdiction over the parties to the dispute on that basis alone, *Rusch v. Savchuk, supra; Keeton v. Hustler Magazine, supra.*

In other words, in order to assert jurisdiction over a nonresident defendant, in addition to reasonableness and fairness, the following must be present:

1.The nonresident defendant must have purposeful, ongoing contacts with the forum state and there must be a properly asserted state interest.

2.The primary focus must be on the defendant's relation with the forum, not the plaintiff's activities.

3.The constitutional issue of jurisdiction, which is paramount, must be resolved before choice of law issues. Although a state's law may be appropriate, appropriateness alone cannot mandate that that state then becomes the forum.

The opinion of the Court of Appeal does not meet the standards set forth above.

1.There are no ongoing, purposeful contacts between the petitioner and the State of California. Petitioner has not lived in California since 1977. There is no properly asserted state interest. Application of California community property law is not a basis for the assertion of California's jurisdiction.

2.The Real Party in Interest's unilateral activity, or, as characterized by the Appellate Court, her lack of activity, i.e. her failure to receive payments in California and the effects of that failure, cannot be the focus of the jurisdictional decision.

3.Again, the Court of Appeal's belief that it is appropriate to apply California community property law to the dispute does not confer jurisdiction upon California.

It is clear that the judgment below does not meet the constitutional standards, and thus the writ should be granted.

C. The Court Below Overlooked Controlling California Supreme Court Decisions That Rely On The Federal Due Process Clause.

The Court referred to one case, *Cornelison v. Chaney, supra.* It ignored subsequent California Supreme Court decisions which clarified the issue of jurisdiction over nonresident defendants.

In *Kumar v. Superior Court, supra,* the California Supreme Court, in bank, referring to *Kulko v. Superior Court, supra,* found that a New York father's use of California courts to secure a habeas corpus order did not make the father subject to California jurisdiction. *Kumar* was not distinguished or referred to in any manner by the Court of Appeal.

In *Secrest Machine Corporation v. Superior Court, supra,* California found that jurisdiction existed when the nonresident defendant had extensive or wide-ranging, or substantial, *continuous,* and systematic activities in this state. In order to reach this decision, the court relied upon *World-Wide Volkswagen v. Woodson, supra,* one of the eight post-1976 United States Supreme Court decisions referred to earlier. It pointed out that in *Secrest, supra,* as opposed to *World-Wide Volkswagen, supra,* there was a direct sale of a product for use in California. The court also delineated the considerable interest California had in assuming jurisdiction. None of the reasons set forth in *Secrest* as a basis of assuming jurisdiction were discussed in the opinion below. The Court of Appeal ignored these decisions.

CONCLUSION

For the reasons stated, petitioner respectfully submits that the writ prayed for should issue.

Respectfully Submitted,

HOWARD MOORE, JR.
JANE BOND MOORE
445 Bellevue Avenue, Third Floor
Oakland, California 94610

Attorneys for Petitioner

Dated: March 4, 1986

APPENDIX

ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 4, No. A031150

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WOODS,

Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF ALAMEDA,

Respondent;

JONES,

Real Party in Interest.

Filed

December 5, 1985

Petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed October 17, 1985, which appears at 172 Cal.App.3d 894. (Cal.Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

Bird, C.J. and Mosk, J., are of the view the opinion should remain published.

Chief Justice

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION FOUR

A031150
(Super. Ct. No. 591158-7)

EUGENE P. WOODS,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent,

HELEN J. JONES,

Real Party in Interest.

FILED

September 17, 1985

At the direction of the Supreme Court, we issued an alternative writ of mandate to determine whether petitioner Eugene P. Woods is entitled to an order from this court directing respondent superior court to quash service of a summons served upon petitioner in Georgia where he now resides. We conclude that respondent court did not err in denying the motion to quash.

Petitioner and real party in interest Helen J. Woods were married in San Francisco, California, in 1953. After 18 years of marriage, they separated and on December 14, 1972, petitioner filed a petition in Alameda County Superior Court for dissolution of the marriage. In the petition, petitioner stated that there was no property subject to disposition by the court. An interlocutory judgment of dissolution was filed on February 26, 1973. Real party was awarded support payments of $330 per month for three years. On October 26, 1984, real party filed an action in California by which she seeks a one-half interest in that

portion of petitioner's military retirement pension which accrued during the marriage. In her complaint real party alleged that the omission of the military retirement pension from the interlocutory and final judgments in the dissolution was a mistake.

Petitioner filed a motion to quash service. In an affidavit in support of the motion, he stated that he last resided in California in 1977 and has no real or personal property in California nor does he do business in the state. Real party opposed the motion but filed no affidavits.[1]

Real party contends that the instant petition challenging the denial of the motion to quash is untimely. Section 418.10, subdivision (c), of the Code of Civil Procedure provides that the defendant may petition an appropriate reviewing court for a writ of mandate upon the denial of his motion to quash. The subdivision also provides that the petition may be filed "within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading. . . ."

The record before this court reveals that the order denying the motion to quash was filed on March 7, 1985. The record, however, does not reveal that there was ever service of a written notice of entry of the order or even that there was entry of the order in the minutes of the superior court. Real party argues that the order was *effectively* served at the hearing on March 7, 1985, when the attorney for petitioner presented the court with an order to be signed. We cannot agree. The statute is specific in starting the time with service of "notice of entry."

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[1] Real party filed a declaration in this court attached to her return in which she sets forth facts which are relevant to the motion to quash. The question before us is whether substantial evidence supports the finding of the trial court on the issue of jurisdiction. (*In re Marriage of Lontos* (1979) 89 Cal.App.3d 61, 71.) We, therefore, have not considered this declaration in reviewing the order denying the motion to quash.

Given the short period in which a petition can be filed, it is important that the point at which the time period starts running be determinable. Mere knowledge of the order is ineffective to start the time running. (Cf. *Okuda* v. *Superior Court* (1983) 144 Cal.App.3d 135, 137-138.)

Timeliness of a petition for mandate where no statute governs is determined by principles of laches. (*Peterson* v. *Superior Court* (1982) 31 Cal.3d 147, 163.) "Laches requires an unreasonable delay in filing the petition plus prejudice to real party." (*Ibid.*) Here the delay was not unreasonable since the petition was filed within the time in which the trial court could have extended the time to petition. It appears from remarks made at the hearing on the motion to quash that the court expected a petition to be filed and considered that such a petition would present issues appropriate for resolution by a reviewing court. Apparently petitioner's counsel believed that when respondent court specified in the order that he had 30 days to answer, he was also being given 30 days to file a petition. Whether that belief was warranted is a matter we need not decide. The 10-day period for petitioning the court never started to run and the petition, having been filed within a reasonable time, may be considered on its merits by this court.

Petitioner's contacts with California in the past were indisputably of a nature which confers personal jurisdiction. He resided in the state, married here, accrued his pension rights here, received a portion of the benefits here and sought the aid of California courts to dissolve the marriage. Petitioner contends, however, that these contacts occurred too long ago to have significance to personal jurisdiction today. The Supreme Court in *Cornelison* v. *Chaney* (1976) 16 Cal.3d 143, 148, articulated an approach to evaluating the significance of contacts of nonresident defendants which we consider appropriate in the instant case. "[A]s the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the

plaintiff can compel him to appear and defend. [Fn. omitted.] The crucial inquiry concerns the character of defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction."

The contacts of petitioner with California mentioned above, while ending approximately eight years before suit was filed, had a direct and substantial connection with the subject matter of this action. The cause of action itself arose out of the failure to list the pension benefits in the dissolution action. Petitioner is, of course, still receiving these benefits, allegedly the property of a California resident and is thus causing an effect in California. This present contact with California, while perhaps too tenuous standing alone to confer jurisdiction (see *Sibley* v. *Superior Court* (1976) 16 Cal.3d 442, 446), is an additional consideration in determining whether the contacts with California in their totality are sufficient to make the exercise of jurisdiction reasonable.

We do not perceive any unfairness to petitioner in requiring him to appear in this action. He petitioned to dissolve his marriage in California and declared that there was no community property to divide. Had he listed his pension benefits as community property, the division would have been made at that time in the dissolution action applying California community property law. If a mistake is to be corrected now in a separate action, it is appropriate that the correction be made by California courts.

We are not holding that the jurisdiction of the dissolution court continued. (See *Henn* v. *Henn* (1980) 26 Cal.3d 323, 332.) We merely hold that petitioner's California contacts, though largely in the past, were of a nature and quality that support the exercise of personal jurisdiction in this action.

The peremptory writ is denied and the alternative writ is discharged.

ANDERSON, P.J.

We Concur:

POCHE, J.

CHANNELL, J.

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ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR

REAL PARTY'S BRIEF IN OPPOSITION

*VIVIAN LYNN HOLLEY
Attorney for Real Party
601 Van Ness Avenue
Suite 2002
San Francisco, CA 94102
(415) 474-1011

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Where the Petitioner accrued marital property while a resident of California, and where Petitioner filed an action for Dissolution of his marriage in California, may California assert its jurisdiction over that same Petitioner in a subsequent action to divide the remainining unadjudicated marital property?

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No. 85-1468

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EUGENE P. WOODS,

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SUPERIOR COURT OF ALAMEDA,

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Real Party In Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION FOUR

REAL PARTY'S BRIEF IN OPPOSITION

Real Party Helen J. Jones respectfully requests this Court to deny the Petition for Writ of Certiorari seeking review of the opinion of the California Court of Appeals, First Appellate District, Division Four, entered September 17, 1985.

STATEMENT OF THE CASE

Petitioner, EUGENE P. WOODS and real party, HELEN J. JONES were married on October 4, 1953, in San Francisco, California, where petitioner WOODS was stationed in the United States Air Force. Both parties were domiciled in the State of California prior to December 14, 1972 when petitioner WOODS, as a resident of California, petitioned the Alameda County Superior Court for a Dissolution of Marriage. At that time, petitioner had been in the military service approximately 24 years and had a vested matured right to military retirement pay.

The parties' 1973 Interlocutory Judgment and 1974 Final Judgment of Dissolution make no reference to division of any military retirement pay or any other community property. Petitioner WOODS' attorney prepared the default Judgment which omitted the community property; real party HELEN J. JONES did not have independent representation.

Pursuant to required California procedure, real party JONES filed the underlying partition action herein. Petitioner WOODS had left California in 1977 and he was located in Georgia and duly served with the Summons and Complaint in the underlying action herein.

Although under California community property law the military retirement pay is property owned by both parties, petitioner WOODS has been the only person receiving the pay. The underlying Complaint alleges that real party HELEN JONES has an undivided one-half interest as tenant in common in that portion of the pension accrued during marriage based upon the length of the

marriage divided by the length of the time of credited service.

Petitioner WOODS made a Motion to Quash Service of Process which was denied on March 7, 1985 by the Alameda County Superior Court, respondent herein. Petitioner sought a writ of mandate. On September 19, 1985, the California Court of Appeal denied the peremptory writ and discharged the alternative writ. On December 5, 1985, the California Supreme Court denied the petition for review and ordered the opinion removed from publication.

Petitioner now seeks review at the United States Supreme Court in order to further delay and prevent California from dividing the former marital property left unadjudicated in the original California dissolution proceeding.

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REASONS FOR DENYING THE WRIT

I. THIS CASE HAS LITTLE SIGNFICANCE BEYOND THE IMMEDIATE PARTIES.

Because the appellate opinion in the instant action has been ordered depublished by the California Supreme Court, the opinion is not available as authority in California or in any other jurisdiction, and its holding is limited to the parties within. Therefore, because it has no precedent value, the importance of the case to the rest of the nation is extremely limited.

Furthermore, it is only by a quirk in California procedure, that the real party, HELEN J. JONES had no alternative but to file a separate partition action in equity to receive her portion of the unadjudicated military retirement pay. In California, modification and enforcement proceedings for missed marital property are not

allowed in the original Dissolution. *Henn v. Henn*, 26 Cal 3d 323, 332, 161 Cal Rptr. 502, 605 P 2d 10 (1980). Division of the cotenancy property resulting from undivided community property must proceed by way of a partition action.

When petitioner WOODS brought his dissolution action in the California Courts, he consented to California's jurisdiction over all of the parties' community property and the Court's obligation to divide it evenly. California Civil Code, Section 4800. Because of California procedure, community property which could have been and should have been adjudicated back in the dissolution, is presently being adjudicated as cotenancy property in a partition action. It is questionable that other jurisdictions outside of community property states must follow this same indirect procedure to complete unadjudicated dissolution matters.

II. CALIFORNIA WAS CORRECT IN ASSERTING JURISDICTION OVER A CAUSE OF ACTION WHICH AROSE WHEN PETITIONER WAS A CALIFORNIA RESIDENT.

A. THE CONTROVERSY BEFORE THE COURT AROSE FROM PETITIONER'S PAST CONTACTS WITH CALIFORNIA.

Unlike cases which attempt to obtain jurisdiction over a defendant based upon minimum contacts which are unrelated to the cause of action in question such as *Kulko v. California Superior Court*, 436 U.S. 84 (1977), *Pennoyer v. Neff*, 95 U.S. 714 (1878), *Helicopteros Nacionales de Columbia, S.A., v. Hall*, 466 U.S. 408 (1984), the exercise of jurisdiction here is in an action that derives its entire cause and substance from the rights and duties that should have been adjudicated in the parties' dissolution which petitioner himself initiated in California, in 1972.

If the present controversy could have been treated as an unfinished element in the original dissolution, petitioner would have no basis for objection to jurisdiction, because he was already before the Court by his consent and original appearance. Although California procedure requires petitioner's former wife to use a partition action to adjudicate the marital property heretofore undivided by the dissolution tribunal, that procedural oddity should not prevent California from completing matters begun in its jurisdiction by Petitioner.

A closer analysis of *Kulko v. Superior Court supra*, where the cause of action also arose from the appellant's personal domestic relations, supports California asserting jurisdiction in the instant action. In *Kulko*, this court found New York to be the appropriate forum where the controversy between the parties arose from a marital separation that occurred in the State of New York, "and a modification was sought in a marital contract negotiated and signed in New York." *Id* at 97. Also, in *Kulko*, the appellant had never left the state of marital domicile. In our case, California is the state of marital domicile, where the real party still resides, and California is the State of the separation and divorce. Petitioner's additional act of seeking a California dissolution furthers the finding in *Kulko* that the proper forum for jurisdiction over remaining marital issues is the State of the marital domicile, the marital separation, and the marital settlement agreement.

B. THE SUBJECT OF THIS ACTION IS SO INTERTWINED WITH THE NATURE AND QUALITY OF PETITIONER'S CONTACTS WITH CALIFORNIA THAT NO OFFENSE TO FAIRNESS AND JUSTICE CAN BE CLAIMED.

In evaluating a State's exercise of jurisdiction for its compliance with the standards of due process, "the inquiry must focus on 'the relationship among the defendant, the forum, and the litigation'." *Rush v. Savchuk,* 444 U.S. 320, 327 (1979), quoting *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977).

Petitioner's relationship with the forum is based on his marriage and divorce in the State, his considerable physical presence between the years 1953 and 1977, and that the military retirement benefits, which constitute the subject of the litigation, accrued while he was domiciled in California. Furthermore, real party's right and interest in those benefits, as a community asset, arose in California, and should have been divided and distributed in the California dissolution.

It is not supposed here that the situs of rights to intangible property can move around with the claimant, giving real party the ability to sue for them wherever she may be. On the contrary, regardless of real party's location, the action should be brought in California. California was the forum that decided the original action for dissolution and petitioner has sufficient minimum contacts with California so that requiring petitioner to, in effect, wind up the last remaining element of the dissolution, does not offend traditional notions of fair play and substantial justice.

Other cases in which a violation of due process has been found, can be distinguished from the case at hand because they do not involve the same kind of relationship with the forum that petitioner has had with California. In *Kulko v. Superior Court,* 436 U.S. (1977), the appellant, unlike petitioner herein, had neither lived his married life, resided nor divorced in California. The litigation did not spring from property accrued while appellant resided in California, nor from a prior court action that had any basis or connection with California. In short, *Kulko's* contacts with California were minimal and without any purposeful availment of the laws of California.

Similarly, in *Rush v. Savchuk,* 444 U.S. 320 (1980), the defendant Rush had no contacts whatsoever with the forum state. This Court held that a liability defendant cannot be subject to the jurisdiction of a state simply because his insurer does business there. In *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1979), this Court held that a violation of due process occurred because the defendant's activity and conduct were not such that would give him reason to anticipate being "hauled into court" in that forum. It was too much to ask that a seller of goods designed to move should anticipate suits wherever those goods might travel. However, in the instant case petitioner himself initiated a legal proceeding in California which gives rise to the litigation at hand, so he cannot claim his appearance is unexpected.

This court in *Helicopteros Nacionales de Colombia S.A. v. Hall,* 466 U.S. 408 (1984), found that because the underlying litigation did not directly relate to the defendant's activities within the State, the defendant's activities did not constitute the kind of continuous and systematic

general business contacts required to uphold the exercise of jurisdiction. *Id.* at 416. The instant case, however, not only derives from Petitioner's activities in the state and the related divorce action, but also includes the personal equivalent of "continuous and systematic general business contacts" with California such as the facts of the parties' marriage, domicile, dissolution and accrual of the marital property in dispute in California.

C. SUFFICIENT MINIMUM CONTACTS EXIST BETWEEN THE NON-RESIDENT PETITIONER AND THE STATE OF CALIFORNIA.

In *International Shoe Company v. State of Washington, et al.,* 326 U.S. 310, 316 (1945), this Court established a jurisdictional standard whereby an out-of-state defendant could be compelled to appear in an action in a foreign state. "Due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

The "minimum contacts" test of *International Shoe* is applied to the specific facts of each case. In determining whether it is "reasonable" and "fair" to require defendant to conduct his defense in California, the quality and nature of his activity within the State must be examined. *Kulko v. California Superior Court,* 436 U.S. 84, 92 (1977).

Upon examination of the record, it is apparent that petitioner married real party in California in 1953. During the marriage, petitioner was present in California and considered California to be his domicile. The military re-

tirement pay at issue herein was accrued while petitioner was a California resident. Based upon petitioner's residence in California in 1972, he filed a California action for a dissolution of his marriage to real party. Petitioner retired and after the dissolution in 1974, while a resident of California, he began to receive the military retirement pay in question. To this day, petitioner receives pay rightfully belonging to real party, causing an effect on real party who has remained in California.

Reviewing the facts of this case, there is no doubt that petitioner purposefully availed himself of the benefits and protections of the laws of California, and that his contacts with the State satisfy the Constitutional requirement of "minimum contacts." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

1. Connolly v. Burt is Substantially Different From the Instant Case.

Although minimum contacts under the Due Process Clause of the Fourteenth Amendment is the subject of this petition as well as of *Connolly v. Burt,* U.S. Sup. Ct., No. 85-298, *cert. granted* (U.S. Dec. 2, 1985), the facts of *Connolly* are so dissimilar that any disposition of *Connolly* can have no bearing on the instant case.

Connolly involves the constitutionality of allowing personal jurisdiction over an out-of-state defendant in an action for defamation, where the defendant never did business, owned property, or resided in Colorado, the forum state. The Tenth Circuit Court found Dr. Connolly's contact with Colorado was his intentional act of sending an allegedly defamatory letter which was calculated to cause injury. *Burt v. Board of Regents,* 757 F.2d 242, 245 (10th Cir., 1985).

There are no facts, claims or similar elements between *Connolly* and the case at hand, because *Connolly* does not contain issues unresolved in a prior litigation in the forum state from which minimum contacts may derive, and which create the significant relationships among defendant, forum and litigation, such that fair play and substantial justice are not offended. *International Shoe,* 326 U.S. 310 (1945), *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977).

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CONCLUSION

The relationship between the petitioner and the forum has been explored and shown to provide multiple, significant and purposeful contacts such that the "minimum contacts" standard has been met. The relationship between the forum and the litigation is both historical and procedural. The subject of this controversy is an interest which should have been adjudicated in the original dissolution action. It is on this basis that the present litigation which arose in California, should remain in California.

The petition should be denied.

Respectfully submitted,

VIVIAN LYNN HOLLEY
Attorney for Real Party
601 Van Ness Avenue
Suite 2002
San Francisco, CA 94102
(415) 474-1011

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